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ASPEN GLOVE SDN BHD v. TIALOC MALAYSIA SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AHMAD ZAIDI IBRAHIM JCA
WONG KIAN KHEONG JCA
B [CIVIL APPEAL NO: K-02(IM)(NCvC)-2178-11-2022]
29 MARCH 2024

Abstract – *(i) The court would be slow to stop another tribunal from exercising its perceived statutory obligation unless it is plainly and obviously clear that it has absolutely no jurisdiction from facts not in dispute or from legal interpretation that could not be seriously challenged; (ii) The contractual adjudication procedure could not stand in the way of a vested right to statutory adjudication conferred by the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') on the unpaid party to a construction contract in writing which is not excluded or exempted under ss. 2, 3 or 40 of the CIPAA. To agree that the contractual adjudication clause under the FIDIC Construction Contract 2017 bars adjudication under the CIPAA would be to allow contracting out of the CIPAA; s. 24 of the Contracts Act 1950 would be engaged to strike down such a clause.*

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CONSTRUCTION LAW: *Adjudication – Adjudicator – Jurisdiction – Unpaid party commenced adjudication proceedings against paying party – Argument that parties had in FIDIC Construction Contract 2017 agreed to refer dispute to Dispute Avoidance Adjudication Board – Whether adjudicator lacked jurisdiction – Whether adjudicator may proceed when jurisdictional objection has been taken – Whether aggrieved party should raise matter on jurisdiction at stage of setting aside of adjudication decision – Construction Industry Payment and Adjudication Act 2012*

F

G

CONSTRUCTION LAW: *Construction contracts – Unpaid party commenced adjudication proceedings against paying party – Argument that parties had in FIDIC Construction Contract 2017 agreed to refer dispute to Dispute Avoidance Adjudication Board ('DAAB') – Whether reference to adjudication null and void – Whether reference to adjudication contrary and/or in breach of terms and conditions of contract entered into between parties – Whether dispute between parties ought to be referred to DAAB – Construction Industry Payment and Adjudication Act 2012*

H

CIVIL PROCEDURE: *Proceedings – Stay – Application for – Unpaid party commenced adjudication proceedings against paying party – Argument that parties had in FIDIC Construction Contract 2017 agreed to refer dispute to Dispute Avoidance Adjudication Board – Whether adjudicator lacked jurisdiction – Whether stay ought to be granted – Courts of Judicature Act 1964, s. 44*

I

The respondent, who was an unpaid party in a construction contract entered into with the appellant, had commenced adjudication proceedings against the appellant, under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). The appellant had taken the argument that the adjudicator lacked jurisdiction as the parties had in the FIDIC construction contract 2017 ('FIDIC contract') agreed to refer the dispute to the Dispute Avoidance Adjudication Board ('DAAB') provided for under cl. 21 of the FIDIC contract. The respondent, in reply, contended that when a jurisdictional objection is taken, the adjudicator may proceed as if he had the jurisdiction and the aggrieved party should then raise it at the stage of setting aside the adjudication decision. Thus, when the respondent served on the appellant a payment claim and the Asian International Arbitration Centre proceeded to register the adjudication application, the appellant filed an originating summons ('OS') before the High Court for, *inter alia*, (i) a declaration that the reference by the respondent to adjudication pursuant to the CIPAA was null and void and contrary and/or in breach of the terms and conditions of the contract entered into between the parties; (ii) a declaration that the alleged payment dispute between the parties be referred to the DAAB pursuant to the terms and conditions of the contract entered into between the parties; and (iii) an order of specific performance that the alleged payment dispute between the parties be referred to the DAAB pursuant to the terms and conditions of the contract entered into between the parties. The appellant proceeded to file, before the High Court, an application for an injunction against the respondent to restrain the respondent from taking any further steps in the adjudication proceedings until the hearing and disposal of the appellant's application for injunction. The respondent applied to strike out the OS and the injunction application. The High Court dismissed the injunction application and struck out the OS. Hence, the present appeals. Pending the hearing of the substantive appeals, the appellant applied to stay the proceedings in the adjudication under s. 44 of the Courts of Judicature Act 1964 ('CJA').

Held (dismissing stay application)
Per Lee Swee Seng JCA delivering the judgment of the court (majority):

(1) Section 44 of the CJA is broad enough to stretch its ambit to even granting an order to stay the proceedings in another tribunal as in before an adjudicator under the CIPAA for a case where the circumstances warrant, as in if the appeal is successful, it would be nugatory or that to prevent prejudice to the parties, the adjudication proceedings ought to be stayed. It could not be seen how the appeal, if successful, would prejudice the respondent's claim or even be nugatory as s. 27(3) of the CIPAA allows the adjudicator to proceed as if he has jurisdiction. The kind of jurisdictional challenge is not mentioned as in whether it is a case of an adjudicator having no jurisdiction at all or one where he has exceeded his jurisdiction. (paras 29-31)

(2) The court would be slow to stop another tribunal from exercising its perceived statutory obligation unless it is plainly and obviously clear that it has absolutely no jurisdiction from facts not in dispute or from legal interpretation that could not be seriously challenged. The court would be more inclined to stay an adjudication proceeding where it is unarguable that the subject matter or core jurisdiction of an adjudicator is absolutely lacking. In cases of contingent jurisdiction, as in the adjudicator would ordinarily have jurisdiction but would have exceeded his jurisdiction if certain provisions of the CIPAA are not fulfilled for instance, then the court would generally not interfere not just because of s. 27(3) of the CIPAA that allows the adjudicator to proceed as if he has jurisdiction but also that his decision with respect to jurisdiction, if wrongly made, could always be set aside under s. 15(d) of the CIPAA on the ground that he had acted in excess of his jurisdiction. (paras 37-39)

(3) From the way in which the DAAB's procedure was drafted, it was at best a mode of resolving dispute prior to the parties proceeding to arbitration. Whatever alternative means or escalating tiers of dispute resolutions procedure and mechanism that may be provided for, it could not take away an express right conferred by statute, in this case the CIPAA, on unpaid parties in a construction dispute over a claim for work done or services rendered. (paras 40 & 41)

(4) Where an adjudicator had considered the objection raised on his lack of jurisdiction and he had informed the parties that he would be proceeding with the adjudication as allowed under s. 27(3) of the CIPAA and the High Court had exercised its discretion to refuse stay of the adjudication proceedings, the Court of Appeal would be slow to grant a stay under s. 44 of the CJA unless it is satisfied that the court below had taken into consideration irrelevant factors and that it had failed to consider relevant factors or that it had plainly erred in interpreting the law. (paras 44 & 45)

(5) The word 'every' in 'every construction contract' in s. 2 of the CIPAA simply means what it says, *ie*, to each and every construction contract as in none are excluded other than those that do not apply by virtue of s. 3 of the CIPAA or exempted under s. 40. The CIPAA thus applies to all construction contracts unless excluded under s. 3 or exempted under s. 40 of the CIPAA. To allow further a contractual exclusion or exemption would be to allow an employer by the stroke of a pen to defeat and bring to nought the whole purpose of the CIPAA. Quite apart from the intention of Parliament, the court could not read 'every' in s. 2 of the CIPAA to be 'every' for so long as the parties have not contractually excluded it. Section 2 must be read to give meaning to each and every word therein and not to disregard it on ground of the parties' so-called consensual exclusion. To allow an exception to be

carved out from a clear declaration of Parliament's intent that the CIPAA, is to apply to 'every construction contract' which is not excluded or exempted in the CIPAA would be to do violence to the words used and more so when an opposite meaning is imposed through interpretation. One cannot impose a meaning on s. 2 of the CIPAA to say that the CIPAA does not apply to parties who had provided otherwise in their contract. (paras 74 & 75)

(6) With the advent of the CIPAA, an unpaid party to a construction contract in writing would have an additional right to statutory adjudication on top of pre-existing modes of resolving disputes such as mediation, contractual adjudication, arbitration and litigation. Statutory adjudication yields a temporary binding adjudication decision until it is set aside by the High Court or the subject matter of the decision is settled by a written agreement between the parties or that the dispute is finally decided by arbitration or the court as provided for in s. 13 of the CIPAA. (para 85)

Per Wong Kian Kheong JCA (concurring in part):

(1) The appellant did not comply with the mandatory requirement under s. 43 of the CJA and r. 14 of the Rules of the Court of Appeal 1994 ('RCA') when it did not file to the High Court for a stay application. Premised on the literal interpretation of s. 43 of the CJA and r. 14 of the RCA and the purposive interpretation of s. 43 of the CJA, encl. 3 should be dismissed with costs solely on the grounds of the appellant's non-compliance of s. 43 of the CJA and r. 14 of the RCA. (para 111)

(2) From the viewpoint of the *stare decisis* doctrine, until the Federal Court decides to adopt a test other than the special circumstances test, the Court of Appeal and all other subordinate courts are bound to apply the special circumstances test as expounded in *Kosma Palm Oil Mill v. Koperasi Serbausaha Makmur Bhd* (*'Kosma'*). Consequently, the lesser threshold prevention of prejudice test under s. 44(1) of the CJA or any test other than the special circumstances test should not be applied in the determination of a stay application pending appeal. If otherwise, such a decision may be *per incuriam* of *Kosma*. (para 112)

Case(s) referred to:

Bintulu Adhesives & Chemicals Sdn Bhd v. Chuah Seah Joo Plywood Industry (Sarawak) Sdn Bhd [2001] 5 CLJ 286 HC ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Emerald Capital (Ipoh) Sdn Bhd v. Pasukhas Sdn Bhd & Another Case [2018] CLJU 459; [2018] 1 LNS 459 HC ***(refd)***

Emrail Sdn Bhd & Ors v. Kuwait Finance House (Malaysia) Bhd [2022] 3 CLJ 521 CA ***(refd)***

Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd [2006] 1 CLJ 197 CA ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Huddersfield Police Authority v. Watson [1947] 2 All ER 193 ***(refd)***
Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals [2020] 1 CLJ 193 FC ***(refd)***
Kasugi Prima Sdn Bhd v. Cobrain Holdings Sdn Bhd [2017] CLJU 1830; [2017] 1 LNS 1830 HC ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***
Likas Bay Precinct Sdn Bhd v. Bina Puri Sdn Bhd [2019] 3 CLJ 499 CA ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***
Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***
Maziah Musa v. Dato' Zainulabidin Mat Akhir & Ors [2014] 5 AMR 793 ***(refd)***
Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***
Ong Koh Hou v. DA Land Sdn Bhd & Ors [2019] 4 CLJ 622 CA ***(refd)***
Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***
Philleoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [1999] 2 CLJ 1023 CA ***(refd)***
Powernet Industries Sdn Bhd v. Golden Wheel Credit Sdn Bhd [2020] 10 CLJ 374 CA ***(refd)***
Sangkala Sdn Bhd v. Bennlim Engineering Sdn Bhd & Anor [1998] CLJU 275; [1998] 1 LNS 275 HC ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2002] 4 CLJ 27 CA ***(refd)***
Sime Darby Energy Solution Sdn Bhd v. RZH Setia Jaya Sdn Bhd [2021] 9 CLJ 880 CA ***(refd)***
Tamabina Sdn Bhd & Anor v. Nakamichi Corporation Bhd [2014] CLJU 328; [2014] 1 LNS 328 CA ***(refd)***
Universal Trustee (Malaysia) Bhd v. Lambang Pertama Sdn Bhd & Anor [2014] CLJU 797; [2014] 1 LNS 797 HC ***(refd)***
View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 2, 3, 5, 6, 12(2)(a), (b), (c), 13, 15(d), 27(1), (2), (3), 28, 29, 30, 37, 40
Contracts Act 1950, s. 24(a), (b)
Courts of Judicature Act 1964, ss. 3, 38(1), 43, 44(1), (3), 73
Employment Act 1955, s. 7
Housing Development (Control and Licensing) Regulations 1989, reg. 11A(2)
Interpretation Acts 1948 and 1967, ss. 2(1)(b), 17A
Moneylenders Act 1951, ss. 15, 17A(3)
Rules of Court 2012, O. 18 r. 19, O. 92 r. 4
Rules of the Court of Appeal 1994, rr. 13, 14, 105
Strata Management Act 2013, s. 149

Other source(s) referred to:

Lam Wai Loon et al, *Construction Adjudication in Malaysia,* 3rd edn, Thomson Reuters Asia Sdn Bhd 2022, p 560

For the appellant - Rajivan Nambiar; M/s Reza Rahim & Rajivan

For the respondent - Thayananthan Baskaran & Aireen Natasha Abdul Wahab; M/s Baskaran

[Editor's note: Appeal from High Court, Sungai Petani; Originating Summons No: KB-24NCvC-103-04-2022 (affirmed).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] Statutory adjudication was not known until the coming into force of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") on 15 April 2014. Before that, the closest to statutory adjudication was contractual adjudication as may be found in the provisions of some industrial-based standard form construction contracts such as the FIDIC Construction contract 2017 and the PAM contract 2018.

[2] The appellant argued that the court must uphold the freedom of contract especially in commercial matters such that if the parties had previously agreed to exhaust the pre-adjudication dispute resolution process before commencing arbitration, then they must be held to their bargain. After all, any attempt to resolve a dispute amicably is to be encouraged and no serious prejudice would be caused to the party who wanted to commence statutory adjudication.

[3] The respondent, who was the unpaid party in the construction contract, argued that there should be no provision restricting, circumscribing or limiting statutory adjudication other than those that are prescribed under the CIPAA. The respondent further argued that to allow an injunction to stay the adjudication proceedings would be to allow the non-paying party to bypass and skirt statutory adjudication and thus to allow a contracting out of the CIPAA. That would be to defeat the purpose of the CIPAA altogether and to denude it of its efficacy.

[4] The appellant had taken the argument in the High Court below that the adjudicator lacked jurisdiction as the parties had, in the FIDIC construction contract 2017 ("FIDIC contract"), agreed to refer the dispute to the Dispute Avoidance Adjudication Board ("DAAB") provided for under cl. 21 of the FIDIC contract.

[5] The respondent in reply contended that when a jurisdictional objection is taken, the adjudicator may proceed as if he has jurisdiction and the aggrieved party should then raise it at the stage of setting aside the adjudication decision. See s. 27 of the CIPAA.

[6] Thus, when the respondent served on the appellant a payment claim and the Asian International Arbitration Centre ("AIAC") proceeded to register the adjudication application on 12 April 2022, the appellant forthwith on 20 April 2022 filed an originating summons before the High Court seeking the following reliefs:

> (i) A declaration that the reference by the respondent of the alleged payment dispute between the parties to adjudication pursuant to CIPAA 2012 is null and void;
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> (ii) A declaration that the reference by the respondent of the alleged payment dispute between the parties to adjudication pursuant to CIPAA 2012 is contrary and/or in breach of the terms and conditions of contract entered into between the parties and is therefore null and void;
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> (iii) A declaration that the alleged payment dispute between the parties be referred to the DAAB pursuant to the terms and conditions of the contract entered into between the parties;
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> (iv) An order of specific performance that the alleged payment dispute between the parties be referred to the DAAB pursuant to the terms and conditions of the contract entered into between the parties;
>
> (v) An interim injunction restraining the respondent from taking any step and/or proceeding in Adjudication No.: AIAC/D/ADJ-4202-2022 until the full and final determination of the Originating Summons.

Before The High Court

[7] The appellant proceeded to file on 25 April 2022 an application for an injunction against the respondent to restrain the respondent from taking any further step in the adjudication proceedings in Adjudication No: AIA/D/ADJ 4202-2022 until the hearing and disposal of the appellant's application for injunction.

[8] The High Court granted the *ad interim* injunction application on 9 May 2022 and the respondent duly applied to strike out both the originating summons and the injunction application under O. 18 r. 19 and/or O. 92 r. 4 of the Rules of Court 2012 ("ROC 2012.").

[9] The High Court agreed with the respondent, who was the unpaid party in the adjudication, that under s. 27(3) of the CIPAA that:

> Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

[10] There was thus no serious issue to be tried as that which an Act of Parliament has sanctioned and approved cannot be the subject of a serious issue to be tried. Thus, the High Court on 15 November 2022 dismissed the injunction application and proceeded to strike out the originating summons as well.

[11] The appellant had appealed to the Court of Appeal from the decisions of the High Court both on the dismissal of the injunction application and the striking out of the originating summons.

[12] Pending the hearing of the substantive appeals, the appellant applied by way of a motion under s. 44 of the Courts of Judicature Act 1964 ("CJA") to stay the proceedings in the adjudication.

In The Court Of Appeal

[13] Learned counsel for the appellant sought to impress upon this court that the test for a stay under s. 44 of the CJA is not confined to the traditional test of special circumstances or that the appeal, if successful, would be nugatory. It was argued that the discretion of the court to grant a stay was broader in that for so long as the appellant's claims would be prejudiced pending the hearing of the appeal, the court may make any interim order that it may see fit to prevent injustice and to preserve the integrity of the appeal.

[14] It was further argued that the Federal Court in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479 had held that there is a difference between a challenge that an adjudicator exceeded his jurisdiction as opposed to one where there was an absolute lack of jurisdiction to begin with, in which case such a challenge may be taken up at any time.

[15] More than that, it was implied that in a case of an absolute lack of jurisdiction, the setting aside strictly speaking could not be made under a s. 15(d) of the CIPAA on the grounds that "the adjudicator has acted in excess of his jurisdiction."

Whether This Court Should Exercise Its Discretion Under Section 44 Of The CJA To Stay The Adjudication Proceedings Pending The Hearing Of The Substantive Appeals

[16] Section 44(1) of the CJA reads as follows:

> **In any proceeding pending before the Court of Appeal** any direction incidental thereto not involving the decision of the proceeding, **any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding**, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered **may at any time be made by a Judge of the Court of Appeal**.
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> (emphasis added)

[17] Learned counsel for the appellant relied on the Court of Appeal case of *Emrail Sdn Bhd & Ors v. Kuwait Finance House (Malaysia) Bhd* [2022] 3 CLJ 521 in arguing for the untrammelled power that is vested in the Court of Appeal to make any interim order to prevent prejudice to the claim of the parties pending the hearing of the substantive appeal. It is said that the court's power is wide and cannot be circumscribed by any limitation unless stated in the statute itself.

[18] Prior to that, there was another Court of Appeal case of *Ong Koh Hou v. DA Land Sdn Bhd & Ors* [2019] 4 CLJ 622 that seemed to suggest that the special circumstance rule does not apply to a s. 44 of the CJA stay and that the Court of Appeal should have greater regard to whether the stay was *bona fide* and for the true purpose of preserving the integrity of the appeal.

[19] As it is the appellant that made the said application, it must satisfy the court that if a stay of the adjudication is not granted in the circumstances of the case, then it would suffer prejudice. No discretionary power is absolute and it is accepted as a basic tenet of the law that all exercise of discretion must take into consideration the relevant factors and test.

[20] Perhaps the inspiration to propound a broader and less rigid test could be traced to the Court of Appeal case of *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299; [1995] 3 MLJ 598 at pp. 306 to 307 (CLJ); pp. 605-606 (MLJ) as follows:

> *The power of this court to grant a stay of execution or a stay of proceedings is to be found in s. 44 of the Courts of Judicature Act 1964* which is in the following terms:
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> ...
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> *This provision confers ample jurisdiction upon this court to grant any order that will have the effect of preserving the integrity of any appeal pending before it*. Whether such an order ought to be granted, and the terms on which it may be granted are entirely within the discretion of this court.
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> At one time it was thought that an appellant had to demonstrate that there were special circumstances warranting a stay of proceedings or of execution. This was founded on the notion that a successful litigant ought not to be deprived of the fruits of his litigation. See the case of *The Annot Lyle* [1886] 11 PD 114. The authority constantly relied upon in support of the proposition that special circumstances ought to be demonstrated before a stay of execution may be granted is the judgment of Brown J in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116. *For my part, having considered the more recent authorities on the subject, I have come to the conclusion that that decision is bad law, and ought no longer to be followed by this court*.
>
> (emphasis added)

[21] Further at pp. 312 to 313 (CLJ); pp. 610 to 611 (MLJ), it was explained as follows:

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that *the appeal to this court, if successful, should not be rendered nugatory*. If upon balancing all

the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.

But cases may arise where, in determining the critical question whether an appeal would be rendered nugatory, this court comes to the conclusion that the point concerned in the pending appeal is obviously unarguable. In such cases it would not, as I perceive the law, be a proper exercise of discretion for this court to shut its eyes to the practical realities of the situation, and to nevertheless proceed to grant a stay.

(emphasis added)

[22] The Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257 was constrained to reinstate the special circumstances test and after referring to a plethora of cases in support of the special circumstances test, expounded and clarified the position of the law as follows:

[18] ... *It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one*. It is an example of special circumstances. In other words, *special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established*. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related. See *Teow Guan & Ors v. Kian Foo Holdings Sdn Bhd & Ors* could have withstood scrutiny if it had merely referred to nugatoriness without rejecting special circumstances. As nugatoriness is a species of special circumstances, a mere reference to it is sufficient to convey the correct legal impression. Any attempt to restrict the grant of a stay to nugatoriness, quite apart from its impropriety, will severely restrict the grounds on which an applicant may rely.

(emphasis added)

[23] We can appreciate that where s. 44 of the CJA is invoked to stay proceedings in the court appealed from or other proceedings (be they arbitration, adjudication or proceedings before a tribunal) in a pending appeal before the Court of Appeal, the Court of Appeal may consider all relevant factors which may be as varied as the varying circumstances of each case under the special circumstances test. After all, the order sought is "any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding" and to preserve the integrity of the appeal. In that sense, it is broader than and different from s. 73 of the CJA which is confined primarily to a stay of execution or of the proceedings in the court appealed from which is the High Court.

[24] Section 73 of the CJA reads:

> Appeal not to operate as stay of execution
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> 73. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

[25] The "prejudice" factor is that of preventing "prejudice to the claims of parties" pending the appeal and surely the Court of Appeal must look at prejudice affecting both parties to the appeal and not just the appellant who failed in the court below.

[26] It would be safe to say that where s. 44 of the CJA is invoked to apply for a stay of execution of a judgment on appeal from the High Court, then the special circumstances test that would be applied would be primarily whether the appeal, if successful, would be nugatory.

[27] The Court of Appeal in *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2002] 4 CLJ 27; [2002] 4 MLJ 113 at p. 34 (CLJ); p. 120 (MLJ) alluded to the broad remedies at the discretion of the court in making an order to prevent prejudice to the parties pending the disposal of the appeal as follows:

> Now, it is significant that the section is markedly different from s. 73. The latter is much narrower. It is confined entirely to applications to stay execution upon a judgment. By contrast, *s. 44 is far wider. It empowers this court to make interim orders to preserve the integrity of an appeal or other proceeding, including the very application under the section itself (see sub-s. (2)). Such interim preservation orders may take the form of an injunction or other relief designed – in the words of the section – 'to prevent prejudice to the claims of parties'*. Further, s. 44, unlike s. 73, does not confer concurrent jurisdiction on the High Court and this court. It confers original jurisdiction on this court. Hence, s. 43 does not apply and there is no requirement that a separate application to the High Court be made before a litigant may invoke the s. 44 jurisdiction of this court. In other words, s. 44 is not to be read as being subject to s. 43.
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> (emphasis added)

[28] In *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd* [2006] 1 CLJ 197, the Court of Appeal held that s. 44 of the CJA was wide enough for it to grant a post-judgment *Mareva* injunction in a case where another panel of the Court of Appeal had concluded hearing the appeal and what was remained was to set a date for delivering its decision.

[29] In a case like the present, s. 44 of the CJA is broad enough to stretch its ambit to even granting an order to stay the proceedings in another tribunal as in before an adjudicator under the CIPAA for a case where the circumstances warrant, as in if the appeal is successful, it would be nugatory or that to prevent prejudice to the parties the adjudication proceedings ought to be stayed.

[30] We cannot see how the appeal, if successful, would prejudice the plaintiff's claim or even be nugatory as s. 27(3) of the CIPAA allows the adjudicator to proceed as if he has jurisdiction as is clear from the words used as alluded to above.

[31] The kind of jurisdictional challenge is not mentioned as in whether it is a case of an adjudicator having no jurisdiction at all or one where he has exceeded his jurisdiction. Granted s. 27(1) speaks of how his jurisdiction is limited to matters raised in the payment claim and payment response in s. 5 and s. 6, respectively, of the CIPAA and further that s. 27(2) deals to parties extending the jurisdiction of the adjudicator by agreement in writing for him to decide on matters not referred to in s. 5 and s. 6.

[32] The Federal Court in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22 made a distinction between a matter where the adjudicator has absolutely no jurisdiction to begin with and one where he has jurisdiction but that nevertheless he has exceeded it. The question of law posed for the Federal Court to answer was:

> Whether a jurisdictional challenge as to the application of the Construction Industry Payment and Adjudication Act 2012 ["CIPAA"] can be made any time by way of application or whether such an application can only be made upon the application to set aside an Adjudication Award under section 15 of the CIPAA.

[33] The Federal Court expounded the position of the law as follows:

> [12] With respect, we are of the view that *the Court of Appeal was wrong as it failed to distinguish between a case where CIPAA did not apply at all and a case where CIPAA applies but the adjudicator acting under CIPAA had exceeded his jurisdiction. Section 15 of CIPAA relates to the latter. Section 15 is predicated on CIPAA applying to the case and to an adjudication decision made under CIPAA. It relates specifically to a complaint that the adjudicator had "acted in excess of his jurisdiction" presupposing the existence of the adjudicator's jurisdiction under CIPAA in the first place*.
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> [13] Learned counsel for the respondent contended that a section 15 of CIPAA challenge can only be made after an Adjudication decision is given. There are no provisions in CIPAA which allow a party to seek court intervention in the midst of adjudication.
>
> [14] Learned counsel for the respondent fortified his argument that a section 15 of CIPAA challenge can only be made after an adjudicator's decision is given by making reference to section 27 of CIPAA as follows: (a) Section 27(1) of CIPAA limits the jurisdiction of the adjudicator to matters raised in the Payment Claim and Payment Response, pursuant to sections 5 and 6 of CIPAA respectively. Section 27(2) of CIPAA allows for that jurisdiction to be extended by agreement of the parties. (b) Section 27(3) of CIPAA gives the adjudicator a discretion to proceed with the adjudication even where a jurisdictional challenge has been

raised, but preserves the right of the parties to apply to set aside the adjudication decision under section 15 of CIPAA or to oppose the enforcement of that adjudication decision.

[15] *We are of the view in substance, the "jurisdiction" spoken of in* section 15(d) of CIPAA *are in circumstances where CIPAA applies and where there is a dispute if the adjudicator has kept himself within his jurisdiction*. Thus, by section 27(2) of CIPAA the parties may by consent extend the jurisdiction of the adjudicator to decide on matters outside the claim on which he first acquired jurisdiction. This is possible only if the term "jurisdiction" is used in the sense of CIPAA being applicable in the first place.

(emphasis added)

[34] Part of the problem is in the different senses in which the word "jurisdiction" is used in the CIPAA. Thus, the Federal Court explained as follows:

[16] The term "jurisdiction" under CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of CIPAA. On this point, in *Terminal Perintis Sdn. Bhd. v. Tan Ngee Hong Construction Sdn. Bhd. & Anor* [2017] MLJU 242, Lee Swee Seng J. observed as follows (at [70]):

> In the application of our CIPAA, we are free from the shackles of the language of administrative law and judicial review. The word 'jurisdiction' is used in section 15(d) as in the adjudicator having acted in 'excess of his jurisdiction' as a ground for setting aside an adjudication decision. It is also used in section 27(1) with respect to an adjudicator's jurisdiction being limited to the matters raised in the Payment Claim and the Payment Response. Then there is a reference to it in section 27(2) with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the Payment Claim and Payment Response. Finally, there is the reference to a 'jurisdictional' challenge, which when raised, does not prevent the adjudicator from proceeding and completing the Adjudication without prejudice to the rights of any party to set it aside under section 15 or to oppose its enforcement under section 28. ... Issues as to whether there is a valid cause of action, does not go towards jurisdiction but rather to the merits of the claim ...

[17] The learned judge also made note of the various types of jurisdictional complaints within CIPAA which may be categorized as core jurisdiction, competence jurisdiction and contingent jurisdiction. The common feature in all of them is the presupposition that CIPAA applies to determine if the adjudicator had kept within his jurisdiction.

[18] We are in agreement with the contention of the appellant that *the error in the judgment of the Court of Appeal is the failure to recognize that the jurisdictional complaint in the present case is that CIPAA did not apply at all because of section 41, and not an "excess of jurisdiction" under section 15, on the basis that CIPAA applied*. It is what is termed as an absolute lack of jurisdiction that may be taken up at any time. On this point, the Singapore High Court case

of *Chip Hup Hup Kee Construction Pte. Ltd. v. Ssangyong Engineering & Construction Co. Ltd* [2010] 1 SLR 658 had this to say: "Thus, it seemed that when what was being alleged was an absolute lack of jurisdiction on the part of a particular tribunal or court to hear a particular dispute, 'jurisdiction' being used in the strict sense of capacity to hear, then if the tribunal concerned does not have such jurisdiction, any party to the dispute may assert the lack of jurisdiction at any stage and can never be held to be estopped from doing so or to have waived its right of protest. On the contrary, when it is a question of irregularity of procedure or contingent jurisdiction or non-compliance with a statutory condition precedent to the validity of a step in the litigation, such irregularity or non-compliance can be waived because the effect of the waiver would not be to create or confer any jurisdiction that did not previously exist.

(emphasis added)

[35] Whilst it is true that a setting aside of an adjudication decision under s. 15(d) of the CIPAA is on the ground that "the adjudicator has acted in excess of his jurisdiction", we are of the view that a setting aside of an adjudication decision where the adjudicator has absolutely no jurisdiction may not be faulted if it is made under s. 15(d) of the CIPAA or alternatively under O. 92 r. 4 of the Rules of Court 2012 under the inherent powers of the court. It is a matter of semantics as in if one has no jurisdiction, to then assume jurisdiction would be to exceed one's jurisdiction. If one starts with zero denoting no jurisdiction, anything more than zero would be in excess of zero and in that sense, in excess of one's jurisdiction.

[36] At any rate, if one has no jurisdiction to decide on a matter, whether it be the non-existence of jurisdiction or the exceeding of jurisdiction, that decision arising from a lack of jurisdiction cannot stand and would have to be set aside, be it under s. 15(d) of the CIPAA or under the inherent powers of the court, as the case may be.

[37] The court would be slow to stop another tribunal from exercising its perceived statutory obligation unless it is plainly and obviously clear that it has absolutely no jurisdiction from facts not in dispute or from legal interpretation that cannot be seriously challenged. A plain and obvious case would be one where the construction contract in writing is with respect to the construction of a single-storey bungalow house by a natural person or that the contract was one wholly carried out overseas and not within the territory of Malaysia. The former is excluded under s. 3 and the latter under s. 2 of the CIPAA.

[38] The court would be more inclined to stay an adjudication proceeding where it is unarguable that the subject matter or core jurisdiction of an adjudicator is absolutely lacking as in the above examples. In *Emerald Capital (Ipoh) Sdn Bhd v. Pasukhas Sdn Bhd & Another Case* [2018] CLJU 459; [2018] 1 LNS 459; [2018] MLJU 440, it was explained as follows:

A [67] I would confine **core or original jurisdiction to matters falling under section 2 of the CIPAA as in it is a Construction Contract within the meaning of section 4, in writing and that the Contract was carried out wholly or partly in Malaysia**. Correspondingly it would be outside the core or original jurisdiction if it falls under the exempted or non-application contracts as provided for in section 3 of the CIPAA in that it
B is a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storey's high and which is wholly intended for his occupation.

[68] It would also be outside the core or original jurisdiction if it comes within the exemption envisaged in section 40 of the CIPAA where the
C Minister has granted an exemption order.

[69] Cases involving contingent jurisdiction would be one where there is a need to comply with some provisions of the CIPAA where ordinarily the adjudicator has the core or original jurisdiction already. One example would be where the adjudicator has no contingent jurisdiction because
D the Payment Claim was not properly served on the non-paying party or that the defence raised was not available when the Payment Response was served but only accrued as in a contractual set-off after the Payment Response was served.

[70] Another example would be where the adjudication response was served out of time and no application has been made to extend the time
E to serve it out of time.

(emphasis added)

[39] In cases of contingent jurisdiction, as in the adjudicator would ordinarily have jurisdiction but would have exceeded his jurisdiction if certain provisions of the CIPAA are not fulfilled, for instance, then the court
F would generally not interfere not just because of s. 27(3) of the CIPAA that allows the adjudicator to proceed as if he has jurisdiction but also that his decision with respect to jurisdiction, if wrongly made, can always be set aside under s. 15(d) of the CIPAA on, ground, that he has acted in excess of his jurisdiction.

G **[40]** From the way in which the DAAB's procedure is drafted, it appears that it is, at best, a mode of resolving disputes prior to the parties proceeding to arbitration. The relevant clauses of the FIDIC construction contract 2017 provide as follows:

H 1. General Provisions

1.1. Definitions

In the Contract the following words and expressions shall have the meanings except where the context requires otherwise

...

I 1.1.29. "Dispute" means any situation where:

(a) one Party makes a claim against the other Party (which may be a Claim, as defined in these Conditions, or a matter to be determined by the Engineer under these Conditions, or otherwise);

(b) the other Party (or the Engineer under Sub-Clause 3.7.2 [Engineer's Determination] rejects the claim in whole or in part; and

(c) the first Party does not acquiesce (by giving a NOD under Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination] or otherwise),

...

1.2 Interpretation

In the Contract, except where the context requires otherwise:

...

(e) **"may" means that the Party or person referred to has the choice of whether to act or not in the matter referred to;**

21. Dispute and Arbitration

21.1 Constitution of the DAAB

Disputes shall be decided by a DAAB in accordance with Sub-Clause 21.4 [Obtaining DAAB's Decision] ...

...

21.4 Obtaining DAAB's Decision

If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [Avoidance of Disputes]) and the following shall apply.

...

21.7 Failure to Comply with the DAAB's Decision

In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then **the other Party may, without prejudice to the other rights it may have, refer the failure itself directly to arbitration** under Sub-Clause 21.6 ...

(emphasis added)

[41] Whatever alternative means or escalating tiers of dispute resolutions procedure and mechanism that may be provided for, it cannot take away an express right conferred by statute, in this case, the CIPAA, on unpaid parties in a construction dispute over a claim for work done or services rendered.

[42] Whilst every encouragement should be given to parties to endeavour to resolve their disputes amicably, it is not in every instance that the court should stay a statutory adjudication or arbitration or even litigation just because there is a reference to a DAAB. The decision whether to stay a proceeding before an adjudicator is a matter within the pure purview of the adjudicator under the CIPAA, as he has a strict time frame of 45 working days to deliver his adjudication decision from the service of the adjudication response or the adjudication reply, whichever is the later under s. 12(2)(a)

of the CIPAA or alternatively within 45 working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received under s. 12(2)(b).

[43] Unless there is an extension of time by the agreement of the parties for him to deliver his adjudication decision under s. 12(2)(c), an adjudication decision which is not made within the period specified in s. 12(2) is void. The strict and speedy time frame within which to deliver the adjudication decision is in keeping with its avowed objective as stated in the long title of the CIPAA as follows:

> An Act to facilitate regular and timely payment, **to provide a mechanism for speedy dispute resolution through adjudication**, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.
>
> (emphasis added)

[44] Where an adjudicator had considered the objection raised on his lack of jurisdiction and where in this case, he had informed the parties that he would be proceeding with the adjudication as allowed under s. 27(3) of the CIPAA and that the High Court had exercised its discretion to refuse stay of the adjudication proceedings, this court would be slow to grant a stay under s. 44 of the CJA unless it is satisfied that the court below had taken into consideration irrelevant factors and that it had failed to consider relevant factors or that it had plainly erred in interpreting the law.

[45] We are of the considered view that the High Court had not so erred and we say that circumspectly in the context of deciding a s. 44 of the CJA application before us and not by way of hearing the substantive appeals which had been filed and which would be heard by a different forum at a future date.

[46] We further doubt the utility of the contractual adjudication provision in that if the appellant is as serious as it said it is, there is no good reason why it cannot be explored whilst the statutory adjudication process continues before the adjudicator. This is not a case where the respondent had stubbornly refused to negotiate but rather one where its patience in waiting for payment had run out and it had no choice but to incur further costs in statutory adjudication in order to get its payment.

[47] We do not think whether one applies the "prevent prejudice to the parties" test or the "special circumstances test" as in the appeal, if successful, would be nugatory, it would yield any different outcome. Essentially, the unpaid party is aggrieved because it has not been paid for work done and the non-paying party is entitled to raise all defences and set-off. However, it would cause serious prejudice to the unpaid party if it were to be compelled to exhaust the dispute resolution process of contractual adjudication, which

would be more time-consuming, not to mention additional costs in paying the members of the DAAB before commencing and continuing with statutory adjudication under the CIPAA.

[48] Unlike a decision in a contractual adjudication, an adjudication decision could be effectively enforced under the provisions of ss. 28, 29 and 30 of the CIPAA. The Court of Appeal had even allowed the filing of a winding up petition based on an adjudication decision. See *Sime Darby Energy Solution Sdn Bhd v. RZH Setia Jaya Sdn Bhd* [2021] 9 CLJ 880; [2022] 1 MLJ 458 and *Likas Bay Precinct Sdn Bhd v. Bina Puri Sdn Bhd* [2019] 3 CLJ 499; [2019] 3 MLJ 244.

Whether It Is Unarguable That A Party To A Construction Contract Cannot Be Allowed To Contract Out Of The CIPAA

[49] If in determining the critical question of whether an appeal would be rendered nugatory, this court comes to the conclusion that the point concerned in the pending appeal is obviously unarguable then it would be a proper exercise of discretion not to grant a stay under a s. 44 of the CJA's application. See the *dicta* of the Court of Appeal in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299; [1995] 3 MLJ 598 at p. 611.

[50] There is certainly no bar to parties proceeding with the DAAB's procedure but not at the expense of the unpaid party having the statutory proceedings stayed and thus not being able to exercise its statutory right to claim for work done under the construction contract.

[51] The statutory right to adjudication under the CIPAA has not been bargained away by the so-called consent of the parties. At most, the parties have agreed to a method of resolving disputes prior to arbitration by way of decision by the DAAB which both parties may agree to abide by if both parties are satisfied with the decision. That cannot bar the unpaid party here in the respondent from exercising its right to proceed with statutory adjudication where its decision under the CIPAA is binding on the parties unless under s. 13 it is:

> (a) It is set aside by the High Court on any of the grounds referred to in section 15;
>
> (b) The subject matter of the decision is settled by a written agreement between the parties; or
>
> (d) The dispute is finally decided by arbitration or the court.

[52] Where a statute confers a right on a weaker party that is out of pocket for work done and labour and raw material and financing costs incurred, the court would be slow in allowing a contracting out of the Act. It is of course easy to say that the contractor doing the work is not obliged to accept the terms of the contract not favourable to it and that it is even at liberty to walk away.

[53] The truth is that in reality, the weaker party has little or no choice, for it is often the employer that would say "take it or leave it" and more so when it is an industry-based standard form contract. Whilst there is no express provision prohibiting contracting out, we are in no doubt that to allow a contracting out would defeat the purpose of the CIPAA. Whilst it is true that it is not mandatory for an unpaid party to proceed with statutory adjudication for it may be able to settle with its employer on negotiated terms or that the project has been completed and it would be more cost-effective to proceed to arbitration in a case where parties have claims and counterclaims, the choice to proceed with statutory adjudication must be available to the unpaid party and be at its option.

[54] In as much as a party cannot be prevented from proceeding with adjudication even when one party had commenced arbitration or litigation, likewise, a party cannot be so prevented even when one party wants to proceed with contractual adjudication under the construction contract. Section 37 of the CIPAA allows for concurrent proceedings in statutory adjudication *vis-a-vis* arbitration or litigation.

[55] Section 37 of the CIPAA reads as follows:

> 37. Relationship Between Adjudication and Other Dispute Resolution Process
>
> (1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.
>
> (2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.
>
> (3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court.

[56] Statutory adjudication proceeds on a different track from arbitration or litigation. They are not opposed to each other, but they complement one another in that whilst statutory adjudication yields an adjudication decision of interim finality, arbitration or litigation would have the element of finality subject only to a setting aside of an award or an appeal as the case may be. Conversely, contractual adjudication is as good only as both parties are prepared to accept the decision made pending arbitration.

[57] Such a decision arrived at after the DAAB has finished its hearing cannot be set up to oppose and obstruct a statutory right which has the bite and sanction of enforcement in the event the unsuccessful party refuses to pay.

[58] To allow parties to contract out of the CIPAA would be to allow parties to defeat the purpose of the CIPAA and to denude it of its efficacy. Parliament does not act in vain and in a case where the clause in question has the effect of defeating the purpose of the Act, the court would strike down such a clause for being null and void and unenforceable.

[59] The Contracts Act 1950, while promoting freedom of contract, also prohibits considerations that, if allowed would defeat the law as follows:

> What considerations and objects are lawful, and what not
>
> 24. The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, **if permitted, it would defeat any law**, ...
>
> ...
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. **Every agreement of which the object or consideration is unlawful is void**.
>
> (emphasis added)

[60] In a clear-cut case where the consideration or object of an agreement as evident from its contractual term is forbidden by a law, then it goes without saying that such a contract is void and unenforceable. Examples would be an agreement to pay someone to commit a criminal act under the Penal Code or some other criminal statutes. The contract would be caught under s. 24(a) of the Contracts Act 1950 as the consideration is forbidden by a law and is unlawful and the agreement is void.

[61] Sometimes, a statute would state expressly that a breach of a certain provision in the Act would render a contract unenforceable like s. 15 of the Moneylenders Act 1951, which provides as follows:

> No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

[62] There are variations of this, such as in s. 17A(3) of the Moneylenders Act 1951 where it is provided as follows:

> (3) Where in a moneylending agreement the interest charged for a secured loan or an unsecured loan, as the case may be, is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable.

[63] At other times, the statute would provide that any terms of a contract less favourable to an employee than a term or condition of service prescribed by the Employment Act 1955 shall be void and of no effect to that extent and the more favourable provisions of the Act shall be substituted, therefore. See for example s. 7 of the Employment Act 1955.

[64] Under reg. 11A(2) of the Housing Development (Control and Licensing) Regulations 1989, for instance, the device of providing that "this regulation shall have effect notwithstanding anything to the contrary in any agreement" is used to prevent the following from being charged by the developer:

> (2) No housing developer shall collect any fee by whatever name called for giving his consent to any purchaser or subsequent purchaser of a housing accommodation to assign his rights and benefits to and in the contract of sale to any financial institution providing a loan for such purchaser to finance or part finance the purchase of the housing accommodation.
>
> ...
>
> (4) **This regulation shall have effect notwithstanding anything to the contrary in any agreement**.
>
> (emphasis added)

[65] The Strata Management Act 2013 uses the device of prohibiting contracting out in s. 149 as follows:

> Contracting out prohibited
>
> 149. (1) **The provisions of this Act shall have effect notwithstanding any stipulation to the contrary in any agreement, contract** or arrangement entered into after the commencement of this Act.
>
> (2) **No agreement, contract** or arrangement, whether oral or wholly or partly in writing, entered into after the commencement of this Act **shall operate to annul, vary or exclude any of the provisions of this Act**.
>
> (emphasis added)

[66] The Singapore equivalent of our CIPAA in its Building and Construction Industry Security of Payment Act 2004 has the following prohibition on contracting out as follows:

> No contracting out
>
> 36. (1) **The provisions of this Act have effect despite any provision to the contrary in any contract or agreement**.
>
> (2) The following provisions in any contract or agreement (whether in writing or not) are void:
>
> (a) a provision under which the operation of this Act or any part of this Act is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part of this Act;
>
> (b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.

(3) The Minister may, for the purpose of subsection (2)(a), prescribe the type of provisions in any contract or agreement, or any class thereof, which are deemed to have the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part of this Act.

(4) Except as provided in subsection (1), nothing in this Act limits or otherwise affects the operation of any other law in relation to any right, title, interest, privilege, obligation or liability of a person arising under or by virtue of a contract or an agreement.

(emphasis added)

[67] Where the above devices are not employed, it is then for the court to interpret the statute as a whole and to decide whether a particular term of a contract has the effect of defeating the law in question as provided under s. 24(b) of the Contracts Act 1950 along the principle that Parliament does not act in vain.

[68] That determination is closely related to the question as to whether the right conferred by statute has a greater public benefit in mind for those affected or whether the right is more of a private and personal right that a person is free to exercise or bargain it away. Thus, in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805 at p. 295 (CLJ); p. 820 (MLJ) ("*Kimlin*'s case"), the Supreme Court observed as follows:

... The question whether a person entitled to the performance of a statutory duty can effectively waive performance of the duty by the person bound and the latter can effectively contract out of performing the duty, depends on the language of the particular statute, and if this is not clear, on the overall purpose of the statute and whether this purpose would be defeated by permitting waiver and contracting out. *Trietel on Contract* (at p 782) has correctly pointed out:

> Difficult questions can arise where a person attempts by contract to waive a right on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute (*qualibet potest renunciare juripro se introducto*), difficulties arise in determining whether right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy require that the right be treated as mandatory and not waiveable by the party for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.

[69] Prior to *Kimlin*'s case (*supra*), it was always thought that a receiver and manager appointed under a debenture would have the power of sale under the debenture and that such a power was in addition to and independent of the powers of sale conferred by the National Land Code ("NLC") on a chargee. Thus, a receiver and manager, prior to *Kimlin*'s case (*supra*) may sell

a charged land by way of a private treaty sale under the debenture and avoid using the provisions of an order for sale under NLC. *Kimlin*'s case (*supra*) corrected that preconceived and misconceived notion of the law.

[70] Other cases that have taken a similar approach are as follows: *Bintulu Adhesives & Chemicals Sdn Bhd v. Chuah Seah Joo Plywood Industry (Sarawak) Sdn Bhd* [2001] 5 CLJ 286; [2000] MLJU 711; *Powernet Industries Sdn Bhd v. Golden Wheel Credit Sdn Bhd* [2020] 10 CLJ 374; [2020] 12 MLJ 412; and *Philleoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [1999] 2 CLJ 1023.

[71] The intention of Parliament to apply the CIPAA to all "construction contracts in writing" across the board with no exemption can be clearly seen in its declaration in s. 2 of the CIPAA as follows:

> This Act **applies to every construction contract made in writing** relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.
>
> (emphasis added)

[72] The only non-application is confined to s. 3 as follows:

> Non-application
>
> This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation.

[73] The word "every" in "every construction contract" in s. 2 of the CIPAA simply means what it says *ie*, to each and every construction contract as in none are excluded other than those that do not apply by virtue of s. 3 of the CIPAA or exempted under s. 40. The CIPAA, thus, applies to all construction contracts unless excluded under s. 3 or exempted under s. 40 of the CIPAA. To allow further a contractual exclusion or exemption would be to allow an employer, by the stroke of a pen, to defeat and bring to nought the whole purpose of the CIPAA.

[74] Quite apart from the intention of Parliament, the court cannot read "every" in s. 2 of the CIPAA to be "every" for so long as the parties have not contractually excluded it. Section 2 must be read to give meaning to each and every word therein and not to disregard it on, ground, of parties' so-called consensual exclusion. Thus, in *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35, the Supreme Court observed as follows:

> ... *The court however is not at liberty to treat words in a statute as mere tautology or surplusage* unless they are wholly meaningless. *On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment*, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.
> (emphasis added)

[75] To allow an exception to be carved out from a clear declaration of Parliament's intent that the CIPAA is to apply to "every construction contract" which is not excluded or exempted in the CIPAA would be to do violence to the words used and more so when an opposite meaning is imposed through interpretation. One cannot impose a meaning on s. 2 of the CIPAA to say that the CIPAA does not apply to parties who had provided otherwise in their contract.

[76] Thus, in *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94, it was held in a similar vein as follows:

> ... The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant*. It must be borne in mind that:
>
> > As a general rule a court will adopt construction of a statute which will give some effect to all of the words which it contains (Per Gibbs J in *Beckwith v. R* [1976] 12 ALR 333 at p. 33).
> > (emphasis added)

[77] In *Kasugi Prima Sdn Bhd v. Cobrain Holdings Sdn Bhd* [2017] CLJU 1830; [2017] 1 LNS 1830; [2017] MLJU 1953, it was observed as follows:

> [28] *To allow a party to contractually bypass Statutory Adjudication would be to allow the purpose of the CIPAA to be thwarted and the CIPAA itself to be a toothless tiger with no bite but only a growl. Parliament does not act in vain and a statutory right conferred by law cannot be taken away by contract. All Employers would only be too keen to contract out of it whether wholly or partially*. In *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Case* [2017] 1 CLJ 101, this court observes at paragraph 93, 94 and 95 at page 122 and 123 as follows:
>
> > [93] In all this debate we must not forget Parliament's intention in enacting CIPAA is to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. The objective and purpose of CIPAA are to provide a solution to payment problems that stifles ~~Nnnn~~cash flow in the construction industry.
> >
> > [94] Martego's claim that CIPAA has no application to the dispute as the parties had made specific contractual arrangements for dispute resolution under cl. 7 of the contract is totally misplaced.

> It would lead down the dangerous road of giving tacit consent to the parties contracting out of CIPAA which can only have the effect of thwarting the purpose of CIPAA altogether.
>
> [95] Martego is still at liberty to pursue with arbitration to correct what it deems to be a wrong decision arrived at by the adjudicator. (emphasis added)

[78] It is both safe and sound to conclude that the CIPAA was designed to serve a protected class of persons *ie*, those who have done the construction works and not being paid; those who have borne the burden of the day and the scorching heat and are out-of-pocket.

[79] There is no good reason for anyone to take away from another person a right or entitlement that the law has granted to the weaker party simply by saying that the other party has freely, voluntarily given up or waived that right or entitlement under the law. The reality of the award of construction contracts is such that the employer would have the upper hand in adopting either an industry-based standard form construction contract or having bespoke clauses that favour it. When one is hungry for work, one has little negotiating power. Parliament intervenes to protect the weaker party that may be taken advantage of after having done the work and incurred costs and expenses in labour, manpower, raw material and financing costs. The contractor doing the actual work ends up "financing" the contract and getting paid last, if at all it gets paid.

[80] This perennial complaint of the contractor led to the passing of the CIPAA, following the example in the UK, Australia, New Zealand and Singapore. The adjudication decision has the element of interim finality whilst the parties take their dispute for a complete resolution *via* litigation or arbitration. When and where Parliament has decided to spell out the rights and entitlement of a person for protection, one would be slow to suggest that the parties to the contract know better what would be in their mutual interest and that once agreed, there is no renegading from it nor for the court to intervene. Taking away from or requiring someone to give up his statutory rights would invariably have the element of a less than honourable intent and, worse, an attempt to circumvent the protective provision of the law, which the court would not allow.

[81] Whilst it may not be easy to differentiate between a private and personal right on the one hand, which may be freely bargained away and that which is protective of a class of persons and thus serving a greater public interest, the court entrusted to so deciding would know which is which and would be able to see one when it is there. Such is the case here and this court has no hesitation to say categorically that the provisions of CIPAA cannot be contracted out and other conditions put in place to defer, deflect or deny its application altogether to construction contracts in writing coming within its application.

[82] Whilst s. 24(a) of the Contracts Act 1950 declares an agreement to be unlawful and void if the consideration or object of the agreement is forbidden by a law, s. 24(b) is much broader in its scope in that even though there is no express prohibition, there may be an implied prohibition as discerned from the purpose of the legislation and the relevant provisions of the statute itself. Thus, under s. 24(b), if a party seeks to contract out of the Act in question, it would be a case where the consideration or object of the agreement is of such a nature that, if permitted, it would defeat any law.

[83] Thus, if a party were to contract in such a manner as to exclude the provisions of an Act then it can be said that to allow such a provision would be repugnant to the purpose of the Act and the court would have to strike down the provision of the contract that has such an effect. See *Sangkala Sdn Bhd v. Bennlim Engineering Sdn Bhd & Anor* [1998] CLJU 275; [1998] 1 LNS 275; [1998] MLJU 648.

[84] One party cannot arrogate to itself the power to ignore and override the express provision of a written law on the grounds of the sacrosanct principle of freedom of contract. Neither can anyone thumb his nose at the Legislature. It is precisely because of the propensity of human nature to bend the law beyond its breaking point or to get around it and avoid its sanctions that we have s. 24 of the Contracts Act 1950 designed to demolish arguments that a contract is valid as the parties have consented as explained by the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 as follows:

> [16] Section 24 of the Act stipulates five circumstances in which the consideration or object is unlawful, namely, where (a) it is forbidden by a law; *(b) it is of such a nature that, if permitted, it would defeat any law*; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or, (e) the court regards it as immoral, or opposed to public policy. 'In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void ... *The provisions of s. 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras (a), (b) and (e) of s. 24 shall be unlawful and the agreement which ensues shall be unlawful and void*. Paragraph (a) deals with what is forbidden or prohibited by law; *para (b) deals with what could defeat the object of any law*; and para (e) deals with public policy' ...
>
> (emphasis added)

[85] With the advent of the CIPAA, an unpaid party to a construction contract in writing would have an additional right to statutory adjudication on top of pre-existing modes of resolving disputes such as mediation, contractual adjudication, arbitration and litigation. Statutory adjudication yields a temporary binding adjudication decision until it is set aside by the High Court or the subject matter of the decision is settled by a written agreement between the parties or that the dispute is finally decided by arbitration or the court as provided for in s. 13 of the CIPAA.

[86] The Federal Court in *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals* [2020] 1 CLJ 193; [2020] 1 MLJ 311 could not have explained it better as follows:

> [62] Besides, we agree with the Court of Appeal's decision in *Bauer (M) Sdn Bhd* that *with the advent of the CIPAA, the claimants in the construction industry now have an additional avenue, a new regime or an additional alternative access to existing dispute resolution forums to claim for their contractual fees. This new avenue of access to justice is in anyone's view a substantive right*. At para 29 of the judgment, the Court of Appeal is fully aware that within the CIPAA there exists a procedural regime dictating as to how claims are to be processed before the adjudicator. *The procedural regime created by the CIPAA is nothing but the by-product or the consequence of the substantive right created by the CIPAA*.
>
> (emphasis added)

[87] Even when another statute had already prescribed a mode of resolving disputes on, for example, an architect's fees *via* arbitration, the Federal Court in *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433; [2020] 6 MLJ 224 held that there is still no bar to statutory adjudication where the non-payment of legal fees is concerned as follows:

> [73] On ground (c), the main plank of the learned counsel for the appellant's submission is that the Architects Act 1967 ('the AA') and the Architects Rules 1996 ('the Rules') provide for a specific dispute resolution mechanism *vis-a-vis* architect's fees; the dispute is one which ought to have been arbitrated instead of adjudicated under the CIPAA 2012.
>
> ...
>
> [76] We are not persuaded. We are fully in agreement with the learned High Court judge that there is nothing to stop the CIPAA 2012 from applying to the case at hand ... and there is no need to see adjudication and arbitration to be mutually exclusive to each other. At pp 615-616, R/R (Jld 6) of his ground of judgment, the learned High Court judge stated:
>
> > [76] ... Adjudication under CIPAA was never designed to be in conflict with Arbitration and Litigation and so *its process may be activated at any time where there is a valid payment claim under a construction contract*. Premised on that proper perspective, the question of which would prevail over the other does not arise at all.
>
> ...
>
> [78] *Further, s. 37 of the CIPAA 2012 provides that an adjudication proceeding, arbitration and court litigation may proceed concurrently and in parallel*. It is also apparent that adjudication is a mandatory procedure under the CIPAA 2012 and *the right to statutory adjudication should not be circumvented by any contract* where parties have agreed to arbitrate.
>
> (emphasis added)

[88] A *fortiori*, a contractual adjudication agreement cannot prevent a party from proceeding with statutory adjudication and clearly, such a right cannot be circumvented or for that matter circumscribed by any contract.

[89] The learned authors Lam Wai Loon *et al*, *Construction Adjudication in Malaysia* (3rd edn, Thomson Reuters Asia Sdn Bhd 2022) at p. 560 commented as follows:

> Contracting out or limiting the application of the CIPA Act 2012 [22.007] Although there is no express provision prohibiting parties from contracting out of the CIPA Act 2012, **no party is allowed to contract out or limit the operation of the CIPA Act 2012 as to do so would defeat the intent and objective of the CIPA Act 2012**, and would therefore be contrary to public policy.
>
> (emphasis added)

Decision

[90] We are, therefore, not persuaded that we should exercise our discretion to stay the adjudication proceedings pending the disposal of the substantive appeals. The subject matter jurisdiction or core jurisdiction of the adjudicator is not in dispute here. The contractual adjudication procedure cannot stand in the way of a vested right to statutory adjudication conferred by the CIPAA on the unpaid party to a construction contract in writing which is not excluded or exempted under ss. 2, 3 or 40 of the CIPAA.

[91] To agree with the appellant/applicant that the contractual adjudication clause under the FIDIC construction contract 2017 bars adjudication under the CIPAA would be to allow contracting out of the CIPAA and s. 24(b) of the Contracts Act 1950 would be engaged to strike down such a clause.

[92] We had thus dismissed the stay application as it was without merits and we ordered costs of RM15,000 to the respondent subject to allocatur.

Wong Kian Kheong JCA (supporting):

Introduction

[93] In court enclosure no. 3 (encl. 3), the appellant company (appellant) had applied for, among others, an interim order from the Court of Appeal pursuant to s. 44(1) of the Courts of Judicature Act 1964 (CJA) to restrain the respondent company (respondent) from taking any step in adjudication proceedings commenced by the respondent against the appellant under the Construction Industry Payment and Adjudication Act 2012 (CIPAA) and registered with the Asian International Arbitration Centre as Adjudication No. AlAC/D/AD J-4202-2022 (adjudication proceedings).

[94] We had unanimously dismissed encl. 3 with costs (Court of Appeal's decision).

[95] In respect of the Court of Appeal's decision, I have been given a draft written judgment prepared by my learned brother, Lee Swee Seng JCA (Lee Swee Seng JCA's judgment).

[96] I concur with the grounds given in Lee Swee Seng JCA's judgment save for the following four matters:

(i) when an appellant applies to the Court of Appeal for a stay of execution of a judgment or order of the High Court (High Court's judgment/order) pending the disposal of the appellant's appeal to the Court of Appeal against the High Court's judgment/order (stay application (pending appeal)), the Court of Appeal can only grant a stay of the High Court's judgment/order (stay order (pending appeal)) under s. 73 of the CJA read with r. 13 of the Rules of the Court of Appeal 1994 (RCA) (not under s. 44(1) of the CJA). Section s. 44(1) of the CJA merely allows a judge of the Court of Appeal (JCA) to grant an interim order pending the disposal of a notice of motion to the Court of Appeal (stay order (pending notice of motion)). The Court of Appeal has no power pursuant to s. 44(1) of the CJA to allow a stay order (pending appeal);

(ii) as the Court of Appeal can exercise its discretion to grant a stay order (pending appeal) under s. 73 of the CJA and r. 13 of the RCA, the Court of Appeal cannot therefore resort to r. 105 of the RCA, its inherent jurisdiction and/or inherent power;

(iii) before an appellant can apply to the Court of Appeal for a stay order (pending appeal), s. 43 of the CJA and r. 14 of the RCA mandatorily require the appellant to first apply to the High Court for a stay order (pending appeal) (stay application (High Court)); and

(iv) in deciding whether to grant a stay order (pending appeal) or otherwise, as a matter of *stare decisis*, the Court of Appeal is bound to apply the test of special circumstances (special circumstances test) as laid down by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1.

Background

[97] The adjudication proceedings have been instituted by the respondent against the appellant and are still on foot at the time of the hearing of encl. 3.

[98] The respondent filed an originating summons in the High Court against the appellant for, among others, a declaration that the adjudication proceedings were void for being contrary to the contract between the appellant and the respondent (which provided for a contractual adjudication before "Dispute Avoidance Adjudication Board" (not adjudication under CIPAA)) (appellant's OS (High Court)).

[99] In the appellant's OS (High Court):

(i) the appellant filed an application for an interlocutory injunction to restrain the respondent from taking any step in the adjudication proceedings until the disposal of the appellant's OS (High Court) (appellant's interlocutory injunction application (High Court));

(ii) upon the appellant's application, the learned High Court Judge granted an *ad interim* injunction to restrain the respondent from taking any step in the adjudication proceedings pending the disposal of the appellant's interlocutory injunction application (High Court) (*ad interim* injunction (High Court)); and

(iii) the High Court allowed an application by the respondent and struck out with costs:

(a) the appellant's OS (High Court); and

(b) the appellant's interlocutory injunction application (High Court)

(High Court's order).

With the High Court's order, the *ad interim* injunction (High Court) came to an end.

[100] The appellant appealed to the Court of Appeal against the High Court's order (this appeal).

[101] Before filing encl. 3 in the Court of Appeal, the appellant did not file an application to the High Court for an "*Erinford*" injunction to restrain the respondent from taking any step in the adjudication proceedings pending the disposal of this appeal.

Can Court Of Appeal Grant Stay Order (Pending Appeal) Under Section 44(1) Of The CJA

[102] I reproduce below ss. 38(1), 44, 73 of the CJA and r. 13 of the RCA:

CJA

s. 38. Composition of the Court of Appeal

(1) *Subject as hereinafter provided, every proceeding in the Court of Appeal shall be heard and disposed of by three Judges or such greater uneven number of Judges as the President may in any particular case determine.*

s. 44. Incidental directions and interim orders

(1) *In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding*, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so *ordered may at any time be made by a Judge of the Court of Appeal.*

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) *Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the court.*

A s. 73. *Appeal not to operate as stay of execution*

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

B RCA

r. 13. Stay of proceedings on appeal

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the court so orders and no intermediate act or proceeding shall be invalidated except so far as the court may direct.

C (emphasis added)

[103] The Court of Appeal had previously granted stay orders (pending appeal) pursuant to s. 44(1) of the CJA (not under s. 73 of the CJA read with r. 13 of the RCA). I highlight the following four Court of Appeal cases D (in chronological order):

(i) in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299; [1995] 3 MLJ 598, at p. 312 (CLJ); p. 610 (MLJ), Gopal Sri Ram JCA (as he then was) has decided as follows:

E *In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) [CJA], is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that* F *an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the status quo.*

(emphasis added)

G (ii) Gopal Sri Ram JCA has delivered the following judgment in *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2002] 4 CLJ 27; [2002] 4 MLJ 113, at pp. 33 to 35 (CLJ); pp. 119 to 120 (MLJ):

We will now address two other provisions of [CJA], namely, ss. 73 and 43. The former confers concurrent jurisdiction on the High Court and this court to grant a stay of execution. The latter says that where an application may be made to H *the High Court or to this court, It must be made to the High Court in the first place. So, if an order is made to the prejudice of a litigant and a stay of that order is necessitated, then it is the High Court that must be moved for such a stay first before this court is approached. If, this court is moved for a stay without an application having been made to the High Court in the first instance, this court should normally adjourn such application until s. 43 is complied with, in our* I *view, this is plain upon a joint reading of ss. 73 and 43. It is a view that derives some support from the judgment of Buhagiar J in Annamalai Chettiar v. Yeoh Kee Tin [1956] MLJ 49. That was a case in which Buhagiar J sitting as a single judge of the former Court of Appeal dismissed an application for stay on*

the ground that the High Court had not first been moved. This is a course we would not approve as it increases costs and Inconveniences the court and parties. An adjournment of the motion for stay until after the High Court has been moved is, in our view, the proper order to make.

We must now address s. 44 [CJA]. It is an important provision.

...

Now, it is significant that the section is markedly different from s. 73. The latter is much narrower. It is confined entirely to applications to stay execution upon a judgment. By contrast, s. 44 is far wider. It empowers this court to make interim orders to preserve the integrity of an appeal or other proceeding, including the very application under the section itself (see sub-s (2)). Such interim preservation orders may take the form of an injunction or other relief designed - in the words of the section – 'to prevent prejudice to the claims of parties'. Further, s. 44, unlike s. 73, does not confer concurrent jurisdiction on the High Court and this court. It confers original jurisdiction on this court. Hence, s. 43 does not apply and there is no requirement that a separate application to the High Court be made before a litigant may invoke the s. 44 jurisdiction of this court. In other words, s. 44 is not to be read as being subject to s. 43.

However, this court has on several occasions treated s. 44 as governing applications for a stay of execution (see See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598, Penang Port Commission lwn. Kanawagi a/l Seperumaniam [1997] 2 MLJ 300, Jurutera Consultant (SEA) Sdn Bhd & Ors v. Eddie Lee Kim Tak & Ors [1999] 1 MLJ 381). Having carefully considered the relevant statutory provisions, my learned brothers and I have come to the conclusion that this is an unnecessarily restrictive view of s. 44 in the absence of any express or implied limitation imposed by the language employed by Parliament. Further, it is most unlikely that Parliament would have enacted two provisions governing the stay of execution. And if Parliament intended the s. 44 jurisdiction to be concurrently exercisable by this court and the High Court, it would have said so. Accordingly, it is our view that an application to this court under s. 44 which is not in the nature of an application for a stay of execution may be made without the necessity of complying with s. 43 [CJA].

(emphasis added)

(iii) according to Hamid Sultan Abu Backer JCA in *Ong Koh Hou v. DA Land Sdn Bhd & Ors* [2019] 4 CLJ 622; [2018] MLJU 778, at [1] to [4], [22], [27] and [28]:

[1] *The appellant/purchaser of a landed property filed an application in Enclosure 7 for an order seeking for a stay of the decision of the High Court pursuant to sections 44 as well as 73 [CJA] ....*

...

[2] *The importance of these two sections is that it gives a say to the Court of Appeal to stay the order of the High Court ...*

[3] In the instant case, we have been informed that the subject property has been disposed of and the respondents say the stay is academic. We do not think so. We find merit in the application for stay. On the

issue of interference of administration of justice which we have mentioned earlier, we take the view it must be by way of separate application and/or action and it depends entirely on the court after hearing submissions on the law whether there was indeed an interference in the administration of justice and whether the new purchaser has to return the property if the appellant succeeds in his appeal proper itself. *In that sense, the appeal is not academic as the appellant has been endowed with the benefit of sections 44, 73, 69 [CJA]*, *etc,* inclusive of section 11(2) of the Specific Relief Act as well as articles 5 and 8 of the Federal Constitution which has nexus to preserve the right of appeal ...

[4] *As the threshold test to grant a section 44 stay is low,* we will not deal with the substantive law related to the grievance of the appellant, save for the sections and Constitutional provisions limited to the stay application only.

...

[22] *We take the view that the special circumstance rule does not apply to a section 44 stay and the principles in See Teow Guan is a sound decision to be guided in granting a section 44 stay ...*

...

[27] *... In our considered view, when the High Court has been informed that an appeal has been filed, it should consider granting an interim stay pending an application under s. 44 [CJA] in the Court of Appeal unless application for stay is frivolous.*

[28] *For reasons stated above, we take the view that it is a fit and proper case to order a section 44 stay with a direction that an early date be fixed for the trial.*

(emphasis added)

(iv) in *Emrail Sdn Bhd & Ors v. Kuwait Finance House (Malaysia) Bhd* [2022] 3 CLJ 521; [2021] 6 MLJ 421 at [81], Ahmad Nasfy Yasin JCA has decided as follows:

[81] *it is to be remembered that the application herein is made under s. 44 [CJA] which invests the Court of Appeal with the power to make 'interim order to prevent prejudice to the claim of parties' pending the hearing of the appeal. In our judgment this power is wide and should not be circumscribed by any limitation that is not specifically stated. Put it differently, unless there are limits specified in the statute for the exercise of the power there is no reason for the provision to be read or implied to limit that power. Accordingly, we find no logical reason for us to limit that power. Accordingly too, the refusal of an Erinford Injuction at the court below, cannot, in our judgment, ipso facto, operate as a bar to an application under s. 44 [CJA] at the Court of Appeal. That said, we must also reiterate that the power is always exercisable when the circumstances is fit and proper. In the present case we find that we ought to exercise that power and we do so.*

(emphasis added)

[104] With respect, I am of the following view regarding the effect of ss. 38(1), 44 and 73 of the CJA:

(i) by reason of s. 38(1) of the CJA, generally, every proceeding in the Court of Appeal shall be heard and disposed of by three judges of the Court of Appeal (Court of Appeal (3 JJCA)). As such, the term "Court of Appeal" in s. 73 of the CJA must refer to the Court of Appeal (3 JJCA);

(ii) it is clear from the words in s. 73 of the CJA (an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders) and r. 13 of the RCA (an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the court (Court of Appeal (3 JJCA)) so orders) that:

(a) as a general rule, the High Court and the Court of Appeal (3 JJCA) should not grant a stay order (pending appeal) (general rule) – please refer to *Universal Trustee (Malaysia) Bhd v. Lambang Pertama Sdn Bhd & Anor* [2014] CLJU 797; [2014] 1 LNS 797; [2015] 7 MLJ 305, at [14] and [15]; and

(b) as an exception to the general rule, the High Court and the Court of Appeal (3 JJCA) can only grant a stay order (pending appeal) if the special circumstances test is fulfilled – please refer to *Kosma Palm Oil Mill*;

(iii) Section 44(1) of the CJA empowers JCA (not the Court of Appeal (3 JJCA)) to:

(a) give any "direction" incidental thereto not involving the decision of the "proceeding" of the Court of Appeal (3 JJCA). Section 3 of the CJA has defined "proceeding" to mean "any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding";

(b) make "any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding" in the Court of Appeal (3 JJCA) (interim order (s. 44(1) of the CJA)). I shall describe the test stipulated in s. 44(1) of the CJA as the "prevention of prejudice test". It is to be emphasised that the prevention of prejudice test is easier to satisfy than the special circumstances test; and

(c) order security for costs (SFC) for a proceeding in the Court of Appeal (3 JJCA) and to dismiss the proceeding if SFC is not furnished for that proceeding.

In view of the words "subject as hereinafter provided" in s. 38(1) of the CJA, it is clear that s. 44(1) of the CJA is an exception to s. 38(1) of the CJA;

(iv) according to s. 44(3) of the CJA, upon an application by a party aggrieved by an interim order (s. 44(1) of the CJA) made by a JCA, the interim order (s. 44(1) of the CJA) may be "affirmed, varied or discharged by the court". By virtue of s. 38(1) of the CJA, the term "court" in s. 44(3) of the CJA can only mean the Court of Appeal (3 JJCA). Accordingly, by virtue of s. 44(3) of the CJA, the Court of Appeal (3 JJCA) can affirm, vary or discharge an interim order (s. 44(1) of the CJA) made by a JCA;

(v) to prevent prejudice to the claims of parties pending the disposal of a notice of motion, a JCA can make a stay order (pending notice of motion) pursuant to s. 44(1) of the CJA. Upon an application by any party aggrieved by the stay order (pending notice of motion) (s. 44(3) of the CJA application), the Court of Appeal (3 JJCA) can then affirm, vary or discharge the stay order (pending notice of motion) under s. 44(3) of the CJA;

(vi) neither one JCA nor the Court of Appeal (3 JJCA) can make a stay order (pending appeal) pursuant to s. 44(1) of the CJA. This view is supported by the following reasons:

(a) Section 73 of the CJA has specifically provided for the discretionary power of the Court of Appeal (3 JJCA) to grant a stay order (pending appeal). Furthermore, s. 73 of the CJA is placed in Part III of the CJA under the heading of "Appellate Jurisdiction – Civil Appeals".

Section 44(1) of the CJA is placed in Part III of the CJA under the heading "General". It is clear that in comparison to the specific provision in s. 73 of the CJA, s. 44 of the CJA is a general provision. In accordance with the canon of construction *generalia specialibus* non derogant, the specific provision of s. 73 of the CJA (not the general provision of s. 44(1) of the CJA) should apply in a stay application (pending appeal).

In the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, at 758 to 759, Gopal Sri Ram JCA has applied the maxim of *generalia specialibus non derogant* to give effect to a specific provision of the National Land Code (NLC) in preference to a general provision in NLC;

(b) if a JCA and the Court of Appeal (3 JJCA) have the discretionary power to grant a stay order (pending appeal) pursuant to s. 44(1) of the CJA:

(1) this will create an absurdity because any party aggrieved by the stay order (pending appeal) made under s. 44(1) of the CJA, may subsequently file a s. 44(3) of the CJA application to the Court of Appeal (3 JJCA) to vary or discharge the stay order (pending

appeal)! In such an event, there will be a duplicity in the form of the stay application (appeal) and s. 44(3) of the CJA application; and

(2) section 44(1) of the CJA provides for the prevention of prejudice test which is a less onerous test *vis-a-vis* the special circumstances test. This will then undermine the general rule – please refer to the High Court's judgment in *Maziah Musa v. Dato' Zainulabidin Mat Akhir & Ors* [2014] 5 AMR 793, at (28(f)); and

(c) the following judgment of Mohd Hishamudin JCA in the Court of Appeal case of *Tamabina Sdn Bhd & Anor v. Nakamichi Corporation Bhd* [2014] CLJU 328; [2014] 1 LNS 328; [2014] 4 MLJ 613, at [16], supports the above view:

> [16] *In our judgment it is crystal clear in the present case that the application is in the nature of a stay of execution. Mr Gideon Tan does not appear to dispute this fact. And this being the case, the application then ought to have been made pursuant to s. 73 [CJA], read with s. 43 [CJA]. The application should not have been made pursuant to s. 44 [CJA]. To having made the application purportedly pursuant to s. 44 [CJA] is an abuse of that section.*
>
> (emphasis added)

(vii) in the previous Court of Appeal cases, which have granted stay orders (pending appeal) under s. 44(1) of the CJA (previous Court of Appeal cases (s. 44(1) of the of the CJA)):

(a) the coram in the previous Court of Appeal cases (s. 44(1) of the CJA) had not been informed that s. 44(1) of the CJA only confers powers on a single JCA (not the Court of Appeal (3 JJCA));

(b) the provision of s. 44(3) of the CJA was not brought to the attention of the coram in the previous Court of Appeal cases (s. 44(1) of the CJA).

According to the Federal Court's judgment delivered by Peh Swee Chin FCJ in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1, at 12 to 13, the Court of Appeal is not bound by its own previous decision which is given *per incuriam*. In this regard, in the English Divisional Court case of *Huddersfield Police Authority v. Watson* [1947] 2 All ER 193, at 196, Lord Goddard CJ has explained the meaning of "*per incuriam*" as follows:

> *What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.*
>
> (emphasis added);

(c) the material facts of *See Teow Guan* concerned an application to the Court of Appeal to stay winding up proceedings in the High Court and did not involve an application to stay the execution of a High Court's judgment/order; and

(d) the judgment of *Tamabina* was not cited in *Ong Koh Hou* and *Emrail*.

Whether Court Of Appeal Can Resort To Rule 105 Of The RCA, Its Inherent Jurisdiction And/Or Inherent Power To Decide A Stay Application (Pending Appeal)

[105] Rule 105 of the RCA provides as follows:

r. 105. Inherent powers of the court.

For the avoidance of doubt, it is declared that nothing in these [RCA] shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
(emphasis added)

[106] According to the following two judgments of our apex courts, if the court is empowered by an express statutory provision, the court then cannot resort to the court's inherent jurisdiction and/or inherent powers:

(i) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 1 MLJ 178, at 181; and

(ii) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405; [2009] 6 MLJ 307, at [28].

[107] In view of s. 73 of the CJA and r. 13 of the RCA, which confers a discretionary power on the Court of Appeal to grant stay orders (pending appeal), there is, therefore, no necessity for the Court of Appeal to rely on r. 105 of the RCA, its inherent jurisdiction and/or inherent power.

Should Appellant Comply With Section 43 Of The CJA And Rule 14 Of The RCA?

[108] I reproduce below s. 43 of the CJA and r. 14 of the RCA:

CJA

s. 43. Applications.

Wherever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

RCA

r. 14. Application which may be made either to High Court or Court of Appeal to be made first to High Court.

Except as otherwise provided by any written law, whenever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

(emphasis added)

[109] Respectfully, I am of the following opinion:

(i) both s. 43 of the CJA and r. 14 of the RCA employ a mandatory term "shall". As such, a literal construction of s. 43 of the CJA and r. 14 of the RCA mandatorily require an appellant to file a stay application (High Court) under s. 73 of the CJA and r. 13 of the RCA before the appellant can apply to the Court of Appeal for a stay order (pending appeal) (literal interpretation (s. 43 of the CJA and r. 14 of the RCA)); and

(ii) CJA has been revised under the Revision of Laws Act 1968. According to s. 2(1)(b) of the Interpretation Acts 1948 and 1967 (IA), Part 1 of the IA applies to the construction of CJA. According to s. 17A of the IA (in Part 1 of the IA), the court shall construe s. 43 of the CJA in a purposive manner (purposive interpretation (s. 43 of the CJA)).

The purposive interpretation (s. 43 of the CJA) is as follows – the Court of Appeal's limited resources should be optimally utilised in the interest of justice and parties. If a stay application (High Court) is filed first and the High Court grants a stay order (pending appeal) pursuant to s. 73 of the CJA read with r. 13 of the RCA:

(a) the Court of Appeal will not be unduly burdened to hear a stay application (pending appeal), especially when the stay application (pending appeal) is filed with a certificate of urgency. In this manner, the finite resources of the Court of Appeal can be employed to dispose of deserving matters; and

(b) parties can save time, costs and effort.

[110] The literal interpretation (s. 43 of the CJA and r. 14 of the RCA) and purposive interpretation (s. 43 of the CJA) is supported by the following judgment of *Tamabina*, at [1], [7] to [15] and [18] to [20]:

[1] *By this notice of motion the applicants/appellants applied to this court for a stay of the execution of the order of the High Court of Shah Alam of 8 November 2013.*

...

[7] *The respondent is opposing this motion on the grounds that it is an abuse of process of the court (a) by purporting to invoke s. 44 [CJA]; and (b) by reason of non-compliance with s. 43 [CJA].*

[8] *We had unanimously dismissed this motion on 2 December 2013, and we now give our grounds.*

[9] *This notice of motion was filed by the appellants purportedly pursuant to s. 44 [CJA], ...*

A ...

[10] *In our judgment, by reason of s. 43 [CJA] that stipulates*:

...

there has, therefore, to be a prior application made before the High Court by the
B *applicants/appellants for a stay of execution of the order*.

[11] *In the present case, however, it is conceded by Mr Gideon Tan (learned counsel for the appellants/applicants) that there has been no prior application made at the High Court*.

[12] *Mr Gideon Tan, nevertheless, submits that the applicants'/appellants' notice of*
C *motion application is made pursuant to s. 44 [CJA]; and that this section exempts the defendants from making a prior High Court application 'given the circumstances' of the present case, citing Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113.

[13] *With respect, we have carefully examined the applicants'/appellants' affidavit*
D *and we find that the applicants/appellants have not given any reason for invoking s. 44 [CJA]; or for not having made the prior application before the High Court*.

[14] *For the position that he takes, Mr Gideon Tan is relying on Silver Concept's case. Yet if one were to examine the judgment in Silver Concept's case one would have noted that the Court of Appeal had ruled* (at p 119):

E > *So, if an order is made to the prejudice of a litigant and a stay of that order is necessitated, then it is the High Court that must be moved for such a stay first before this court is approached*.

[15] *Then, at a later part of the judgment, the Court of Appeal further ruled* (at p 120):

F > *Accordingly, it is our view that an application to this court under s. 44 which is not in the nature of an application for a stay of execution may be made without the necessity of complying with s. 43 of the Act*.

...

G [18] *Mr Gideon Tan further submits in the alternative that even if this court is of the view that there should have been a prior application made to the High Court, as required by s. 73 read with s. 43 [CJA], this court should not dismiss the motion, but to adjourn the application until s. 43 is complied with. Learned counsel referred to that part of the judgment in Silver Concept's case where Gopal Sri Ram JCA (as he then was), in delivering the judgment of the court, states* (at p 119):

H > *If, this court is moved for a stay without an application having been made to the High Court in the first instance, this court should normally adjourn such application until section 43 is complied with. In our view, this is plain upon a joint reading of ss. 73 and 43. It is a view that derives some support from the judgment of Buhagiar J in Annamalai Chettiar v. Yeoh Kee Tin [1956] MLJ 49. That was a case in which Buhagiar J sitting as a single*
I *judge of the former Court of Appeal dismissed an application for stay on*

> *the ground that the High Court had not been moved first. This is a course we would not approve as it increases costs and inconveniences the court and parties. An adjournment of the motion for stay until after the High Court has been moved is, in our view, the proper order to make.*
>
> *[19] With respect, we are unable to agree with this remark which is an orbiter dicta. Section 73 [CJA] merely states*:
>
> ...
>
> [20] *Reading s. 43 with s. 73, we fail to see anywhere in these sections implying that we should not dismiss the application (for not complying with s. 43) but must grant an adjournment to enable the defaulting the applicants/appellants to comply with s. 43 by going to the High Court to make the stay application*.
>
> (emphasis added)

[111] In this case, the appellant did not comply with the mandatory requirement s. 43 of the CJA and r. 14 of the RCA when the appellant did not file a stay application (High Court) (appellant's non-compliance (s. 43 of the CJA and r. 14 of the RCA)). Premised on the literal interpretation (s. 43 of the CJA and r. 14 of the RCA) and purposive interpretation (s. 43 of the CJA), encl. 3 should be dismissed with costs solely on the grounds of the appellant's non-compliance (s. 43 of the CJA and r. 14 of the RCA).

Court Of Appeal Is Bound To Apply Special Circumstances Test

[112] From the viewpoint of the *stare decisis* doctrine, until the Federal Court decides to adopt a test other than the special circumstances test, the Court of Appeal and all other subordinate courts are bound to apply the special circumstances test as expounded in *Kosma Palm Oil Mill*. Consequently, the lesser threshold prevention of prejudice test under s. 44(1) of the CJA or any test other than the special circumstances test, should not be applied in the determination of a stay application (pending appeal). If otherwise, such a decision, may be *per incuriam* of *Kosma Palm Oil Mill*.